

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 24, 2006

**STATE OF TENNESSEE v. MONTGOMERY HILTON GARNER,
ALIAS MONTGOMERY WELLS**

**Appeal from the Criminal Court for Hamilton County
No. 247367 Douglas A. Meyer, Judge**

No. E2006-00632-CCA-R9-CD - Filed December 1, 2006

The defendant, Montgomery Hilton Garner, appeals by permission of the trial and appellate courts pursuant to Tennessee Rule of Appellate Procedure 9. The trial court granted a mistrial during the defendant's trial for attempted first degree murder and domestic aggravated assault. The defendant claims that double jeopardy bars his retrial. We hold that no manifest necessity existed for the mistrial and that double jeopardy bars retrial. We reverse the trial court and remand the case for dismissal of the charges.

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Criminal Court Reversed,
Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Larry Young and Susie Lodico, Chattanooga, Tennessee, for the appellant, Montgomery Hilton Garner, alias Montgomery Wells.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William H. Cox, III, District Attorney General; James A. Woods, Jr. and Leslie Anne Longshore, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The defendant's charges arose from an admitted armed assault, in which he shot the woman with whom he was living in the buttocks. The issue at trial was one of the defendant's intent. Before trial, the state moved in limine to exclude evidence of the victim's previous mental health treatment. The defendant opposed the motion on the basis that the victim's mental condition and treatment were relevant to her credibility, particularly her ability to remember accurately the events forming the basis for the prosecution. The trial court conducted a hearing on the motion, and it ruled

that the evidence was inadmissible unless it became relevant during the victim's testimony. The court ordered that the defense should request a jury-out hearing before any mention of the victim's mental health history.

At the trial, the victim testified that she was living with the defendant on the date of the relevant events and that she "had just come back home after being gone for four months." The victim testified that she left home four months earlier because she was being mistreated and that she had gone to live in a Best Western hotel. She said that she returned home because she was out of money and that she thought she should be able to live in her own home and "somebody else" should leave.

The defense conducted a vigorous cross-examination of the victim, highlighting several apparent weaknesses in her testimony. Among other things, she answered affirmatively when asked if she lived alone in a motel for four months. Later in the cross-examination, the following exchange occurred:

- Q. All right. Now part of the time you were gone, you were not in the motel. Where were you part of the time before you got shot, the three months before you got shot?
- A. In a motel.
- Q. In a motel. What about the hospital? Where were you in the hospital for part of that time.
- A. In the motel.
- Q. You never were in the hospital during the three months before you were shot?
- A. Huh-uh.

After a period of contentious cross-examination regarding the victim's recollection of the part of her body that the defendant shot and the medical evidence, defense counsel returned to the topic of the victim's psychiatric hospitalization, asking, "The fact is that 30 days before you came back to [the defendant] to live in the house, in your house, you were in Moccasin Bend Hospital and committed; weren't you?" The assistant district attorneys general both objected, and the victim answered, "No," before the proceedings were halted.

In a jury-out hearing, one of the assistant district attorneys general informed the court that he had instructed the witness not to answer questions about her psychiatric history because of the earlier in limine order. The record reflects some confusion about the precise time of the victim's confinement to the psychiatric hospital. The prosecutor moved for a mistrial, arguing, "My credibility is gone, my victim's credibility is gone[.]" The defense opposed the motion and suggested that the court could correct the situation. Before granting a mistrial, the trial judge commented that the "victim is a terrible witness." The judge advised the state, "Here's the point: I really think maybe that he [defense counsel] should go into her mental capacity. I think it helps the State, because she has, she does have problems." The state continued to press for a mistrial. The

defense specifically objected to a mistrial and urged the trial court to give the jury an appropriate instruction. Before granting the state's motion, the trial court said, "If he [the prosecutor] wants a mistrial, I'll grant it, but you may regret it, because the Court of . . . Criminal Appeals may not let you retry it." The state did not change its position, and before the trial court declared a mistrial and dismissed the jury, it advised the prosecution that it was "very questionable that you would be able to prove intent to commit first degree murder." The parties attempted unsuccessfully to reach a plea agreement, and ultimately, the court recalled the jury and declared a mistrial.

The defendant filed a motion to dismiss the indictment on the basis that double jeopardy barred his retrial. The trial court denied the motion by written order. The defendant sought and obtained permission from the trial court to pursue an interlocutory appeal to this court, and we granted the defendant's application. The issue before us is whether the state is barred by constitutional principles of double jeopardy from retrying the defendant.

The Double Jeopardy Clauses of the United States and Tennessee Constitutions state that no person shall twice be put in jeopardy of life or limb for the same offense. U.S. Const. amend. V; Tenn. Const. art. I, § 10. The clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969) (footnotes omitted), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989); State v. Phillips, 924 S.W.2d 662, 664 (Tenn. 1996). In a jury trial, jeopardy attaches when the jury is sworn. See State v. Knight, 616 S.W.2d 593, 595 (Tenn. 1981).

Once jeopardy attaches, a defendant has a valued interest in having the particular jury selected for trial render a verdict. United States v. Jorn, 400 U.S. 470, 485-86, 91 S. Ct. 547, 557-58 (1971). The policy behind limiting the state to a single proceeding is the recognition that:

the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223 (1957). Although the Double Jeopardy Clause protects the defendant, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." Wade v. Hunter, 336 U.S. 684, 688-89, 69 S. Ct. 834, 836-37 (1949).

Normally, a mistrial should be declared only if there is a manifest necessity for such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision of whether to grant

a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This court will not disturb that decision unless there is an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). A manifest necessity exists when there is “no feasible alternative to halting the proceedings.” Knight, 616 S.W.2d at 596.

[R]etrial will not be prohibited by double jeopardy principles where the ends of justice, under the circumstances, would otherwise be defeated, or where the circumstances show that a fair and unbiased trial could not be had, or where any unforeseen emergency, contingency, or happening after the empaneling of the jury prevents the trial from going forward according to orderly and established legal procedure.

State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994) (citations omitted). When the state seeks to avoid the double jeopardy bar to retrying a defendant, it bears the burden of demonstrating manifest necessity for the earlier mistrial. Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 830 (1978); State v. Taylor, 912 S.W.2d 183, 186 (Tenn. Crim. App. 1995); Smith, 810 S.W.2d at 158.

Of interest, it was the state in this case, not the defendant, that claimed prejudice and was granted a mistrial. The focus of our inquiry, then, is whether the state was irreparably damaged such that a manifest necessity existed for a mistrial. The assistant district attorney who pressed for the mistrial argued that his credibility and that of the victim was beyond salvage. The prosecutor argued that the victim had answered untruthfully about her hospitalization because “[the victim] was under the instruction of the Court, through me, not to talk about psychiatric records.” The state took the position that no adequate curative instruction existed for the situation.

The victim testified on direct examination that she had stayed in a motel for four months due to difficulties living with the defendant and that she had returned to their shared home approximately two weeks before she was shot. She testified on cross-examination that she had not lived anywhere other than in a motel for the four months she had been gone. This testimony made the fact that she had been in a hospital for part of that time relevant for impeachment of her credibility because it demonstrated her untruthfulness as a witness.¹ After she denied being hospitalized, the more specific fact of her hospitalization at Moccasin Bend Hospital became relevant to impeach her credibility, as well, because it further demonstrated her untruthfulness as a witness. See Tenn. R. Evid. 401 (relevance), 607 (impeachment of witness credibility). Thus, as an evidentiary matter, the cross-examination of the victim was proper because it was relevant to impeach her credibility, notwithstanding that the cross-examination was in violation of the trial court’s order.

¹ Although there was some disagreement about the precise dates of the hospitalization, neither party disputes that the victim underwent psychiatric hospitalization for some period of time while she was out of the home. On appeal, the state concedes that it “appears” that the prosecutor was mistaken about the accuracy of the victim’s testimony based upon the dates she was hospitalized.

The trial court had excluded the evidence pending further review of its relevance once the trial was underway, but it had become relevant based upon the victim's testimony. The victim's credibility had already been vigorously attacked, as is evident from our review of her testimony on cross-examination and from the observations made by the trial court about the victim's poor performance as a witness. The state argues on appeal that the circumstances created an implication that the victim and the state were attempting to deceive the jury. However, we are not convinced that the trial court could not have fashioned, and that the jury would have disregarded, an instruction which clarified that the prosecutor and the state had resolved their misunderstanding of the defense's questions on cross-examination about the victim's hospitalization and its time frame. In fact, the record demonstrates that the victim's testimony was otherwise substantially challenged on cross-examination. We believe that a jury could have placed any evidence of the victim's psychiatric treatment and a curative instruction in the proper perspective and that the state would not have been irreparably damaged by either.

The state argues that the ends of justice will be defeated by allowing the defendant, who admitted his criminal responsibility for shooting the victim but challenged his level of intent for the charged offenses, to avoid prosecution. Any doubts about whether manifest necessity existed for a mistrial must necessarily be resolved in favor of the defendant. See State v. Carollette Stephens, No. E2005-01925-CCA-R9-CD, Knox County (Tenn. Crim. App. Oct. 13, 2006). In this case, though, we believe that the ends of justice were defeated by the state's seeking and obtaining a mistrial for tactical gain, as opposed to manifest necessity. The state believed the victim misunderstood its instructions to her, which weakened her credibility and the state's case. We view the state's goal in obtaining a mistrial was to start over without making the same mistake. The defendant's right against double jeopardy bars such an attempt.

By our holding, we do not mean to condone defense counsel's violation of the trial court's order that the victim's psychiatric history not be mentioned before a jury-out hearing. We recognize that, in proper circumstances, defense counsel's misconduct may create manifest necessity for a mistrial. See, e.g., Arizona v. Washington, 434 U.S. at 511, 98 S. Ct. at 833. However, although the defense failed to request a jury-out hearing, the trial court determined that the questioning regarding the mental health issue was relevant and proper. The defense had nothing to do with the victim's denying any hospitalization during the time in question. Any prejudice to the state's case incurred during the cross-examination was caused by the victim's untruthful testimony and not by the defense.

We conclude that this was not a case in which there was "no feasible alternative to halting the proceedings." Knight, 616 S.W.2d at 596. In consideration of the foregoing and the record as a whole, the judgement of the trial court is reversed and the case is remanded for entry of an order dismissing the case.

JOSEPH M. TIPTON, PRESIDING JUDGE